HOCK HUA BANK BHD

v.

CHAN SIEW YAN

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S6-F 1386-1984]
16 JUNE 2005

CIVIL PROCEDURE: *Judgment - Consent judgment - Compromise - Existence of - Whether order of court clear and unequivocal - Whether there was nothing left to adjudicate*

The defendant herein had applied by way of summons in chambers (encl. 56) for the date for the auction of the charged property fixed for 3 February 2005 be vacated and a notice of appeal to the judge in chambers (encl. 58) appealing against some parts of the senior assistant registrar's decision allowing plaintiff's application in summons for directions for the charged property to be sold by public auction on the reserved price of RM1,900,000. On 14 January 2005, the defendant and the plaintiff consented to encl. 56 and asked for a fresh date for auction to be some time in April 2005. In regard to encl. 58, it was consented that the reserve price be fixed at RM2.5 million *in lieu* of RM1.9 million. Thereafter, the defendant applied by way of summons in chambers (encl. 68) for the sale by auction on 28 April 2005 of land be stayed or postponed. The court dismissed encl. 68 since the matter has ended by way of compromise on 14 January 2005. The defendant thus filed an appeal against the said decision.

Held:

[1] The existence of a compromise could be seen in the consent judgment entered by the parties on 14 January 2005. There was no evidence of fraud, duress, threat, inducement or promise in order to vitiate the compromise. The order of this court was clear and unequivocal. The property in question has since been auctioned off on 28 April 2005. Enclosures 56 and 58 ended with the consent of both parties and so it had been disposed off. There was nothing left to adjudicate and encl. 68 was rightly dismissed with costs. (pp 67 a-b & 68 d, g-i)

[Order accordingly.]

Case(s) referred to:
Callisher v. Bischoffsheim [1870] LR 5 QB 449 ***(refd)***
Currie v. Misa [1875] LR 10 Ex 153 ***(refd)***
Elsas v. Williams [1884] 52 LT 39 ***(refd)***
Filmer v. Delber [1811] 3 Taunt 486 ***(refd)***
Gurney v. Grimmer [1932] 38 Com Cas 12 ***(refd)***
Lynch v. Cowell [1865] 12 LT 548 ***(refd)***
Marsden v. Marsden [1972] Fam 280 ***(refd)***
Re NFU Development Trust [1972] 1 WLR 1548 ***(refd)***
Rumsey v. King [1876] 33 LT 728 ***(refd)***
Smallman v. Smallman [1972] Fam 25 ***(refd)***
Strauss v. Francis [1866] LR 1 QB 379 ***(refd)***
Wright v. Soresby [1834] 2 Cr & M 671 ***(refd)***

Legislation referred to:
National Land Code, s. 256

For the plaintiff - K Anantham; M/s Skrine
For the defendant for the session on 14 January 2005 - M Prasad Abraham; M/s Prasad Abraham & Assoc
For the defendant for the session on 22 April 2005 - Munir Abdullah; M/s Munir & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an old case. A 1984 case. It came before me fleetingly on 14 January 2005 and, once again, on 22 April 2005.

On 14 January 2005, Mr. Prasad Abraham appeared for the defendant while Mr. K. Anantham appeared for the plaintiff. Counsel on both sides were magnanimous. They consented to prayer 1 of encl. 56 and they craved for a fresh date for auction sometime in April 2005. And so, I made the following orders:

> By consent, order in terms of prayer 1 of enclosure 56 and the auction date would be on the 28th of April 2005.

In regard to encl. 58, Mr. K. Anantham had this to say:

> As regards enclosure 58, by consent the reserve price be fixed at RM2.5 million *in lieu* of RM1.9 million.

Mr. Prasad Abraham agreed to the proposition of Mr. K. Anantham and I then made the following orders:

> By consent in relation to enclosure 58, the reserve price is fixed at RM2.5 million *in lieu* of RM1.9 million. File is to be closed.

On 22 April 2005, the parties appeared before me. The defendant has changed her counsel and she was represented by Mr. Munir Abdullah. The plaintiff still retained Mr. K. Anantham as its counsel. The notes of evidence for the session on 22 April 2005 merit reproduction. It reads like this:

Both parties

> Matter has ended as per the session on 14.1.2005.

Anantham

> May enclosure 68 be dismissed with costs since the matter has ended by way of a compromise on 14.1.2005.

Munir

> I am not aware of what had happened on 14.1.2005. I pray that there be no order as to costs.

Anantham

> The defendant doesn't seem to stop at anything. She changes her counsel and she files enclosure 68.

Mahkamah

> Enclosure 68 is dismissed with costs. Again the file is to be closed.

It is appropriate, at this juncture, to explain what encls. 56, 58 and 68 are all about.

Enclosure 56 was the defendant's application by way of a summons in chambers for the following orders:

> 1. The date for the auction of the charged property fixed for the 3.2.2005 by the learned senior assistant registrar be vacated.
>
> 2. Further or in the alternative auction proceedings fixed for the 3.2.2005 in respect of the charged property be stayed pending the disposal of the appeal of the defendant against the reserved price fixed by the senior assistant registrar set at ringgit Malaysia one million and nine hundred thousand (RM1,900,000.00).

While encl. 58 was a notice of appeal to the judge in chambers filed by Messrs Prasad Abraham & Associates for and on behalf of the defendant appealing against some parts of the decision of the senior assistant registrar that was handed down on 24 November 2004 wherein it was ordered that the plaintiff's application in summons for directions dated 28 January 2004 for the charged property to be sold by public auction on the reserved price of RM1,900,000 in this action dated 24 November 2004 under s. 256 of the National Land Code be allowed with costs.

Enclosure 68 was an application by the defendant by way of a summons in chambers for the following orders:

(1) the sale by auction on 28.4.2005 of land held under grant for land No: 12562, Lot 98, Section 86, Town of Kuala Lumpur with a bungalow house erected thereon be stayed and/or postponed until the final disposal of civil suit no: S6-22-323-2004 (hereinafter referred to as the 'fresh suit');

(2) costs of this application be costs in the cause; and

(3) such further and other order, direction and relief as this Honourable Court deems fit and just.

It cannot be doubted that by consent prayer 1 of encl. 56 and by consent encl. 58 too had ended when the court was in session on 14 January 2005. Since the two matters had ended by way of a compromise, encl. 68 was dismissed with costs on 22 April 2005.

The Appeal

I was surprised that the defendant through her counsel by the name of Mr. Munir Abdullah has filed an appeal against my decision in dismissing encl. 68 with costs. The facts weighed heavily against the defendant. There was a compromise between the parties.

The Facts

The charge of the property in question (referring to Lot No: 98, section 86, town of Kuala Lumpur, district of Kuala Lumpur bearing postal address at No: 6, Lorong Titiwangsa 1, 53200 Titiwangsa, Kuala Lumpur) was registered on 15.3.1977 and it was a third party charge created by the defendant for the benefit of her husband by the name of Leong Yew Chin to secure banking facilities of the sum of RM300,000 together with interest thereto. Being dissatisfied, the defendant further created another third party charge of the same property to secure further banking facilities of the sum of RM300,000 together with interest to her husband and that charge was registered on 15 May 1978. The loan went into default and on 9 August 1984, a notice under Form 16D as prescribed under the National Land Code was sent to the defendant and she acknowledged receipt of the same. And upon the defendant's default to

pay the sums as demanded, an originating summons was filed and it was dated 8 November 1984 seeking, *inter alia*, an order for the sale of the property in question. The originating summons was stayed on 30 January 1985 by Siti Norma Yaacob J (now the Chief Judge of Malaya) pending the disposal of civil suit no: 1073/80 which was consolidated with civil suit no: 1279/85. These two suits were finally disposed off on 26 May 1994 by VC George J and his Lordship consequently ordered that the originating summons be proceeded with. VC George J's decision was appealed against and the appeal came up before the Federal Court on 14 February 1996 and the Federal Court forthwith dismissed the appeal with costs. So, with no other legal impediment, the plaintiff bank was certainly entitled to seek an order for the sale of the property in question.

In responding to encl. 68, the legal assistant of Messrs Skrine affirmed an affidavit in reply on 19 April 2005 as seen in encl. 72 and there it was deposed that the defendant's claim amounted to nothing more than taking a second bite at the cherry, so to speak, when the defendant sought to set aside the order for sale of the property in question dated 10 November 1997 which was already refused by the High Court and by the Court of Appeal. It was further deposed that the action herein was barred by the doctrine of *res judicata.* In that affidavit in reply, reference was also made to the affidavit of Teh Kooi Kim that was affirmed on 29 May 2004 which dealt with a related action dealing with the reasons as to why the claim of the defendant for the property in question was devoid of merit under the doctrine of *res judicata* and that the claim in damages was statute barred. The same affidavit in reply in encl. 72 also deposed that the claim for damages being barred by limitation. It was also deposed that the plaintiff being one of the largest banks in Malaysia is more than capable of satisfying any judgment for damages which the defendant may obtain in this action. For all these reasons, the plaintiff craved that the defendant's application in encl. 68 for stay be dismissed with costs so that the order for sale that was obtained some seven (7) years ago can proceed with expeditious despatch.

From the court records it can be discerned that the auction sale had been conducted on 28 April 2005 and the plaintiff (now known as the Public Bank Berhad by way of a substitution as ordered by the court on 24 November 2004) was the successful bidder of the property in question for the sum of RM2.5 million. That would bring an end to the long wait which the plaintiff had endured before the property in question was finally auctioned off.

Analysis

It must be borne in mind that the session on 14 January 2005 had put an end to encls. 56 and 58. Both these two enclosures ended with the consent of both parties and so it had been disposed off. There was nothing left to adjudicate and encl. 68 was rightly dismissed with costs.

Mr. K. Anantham for the plaintiff rightly submitted that the parties had compromised on 14 January 2005. Indeed there must be a dispute before the parties could compromise. In *Gurney v. Grimmer* [1932] 38 Com. Cas. 12 at p. 18, Lawrence LJ aptly said that when a matter had been compromised it "assumes that a mutual concession has been made by both parties and that each party has got something less than he claimed." On the other hand, Brightman J in *Re N.F.U. Development Trust* [1972] 1 WLR 1548 at p. 1555 said that "the word 'compromise' implies some element of accommodation on each side." The notes of evidence for the session on 14 January 2005 showed an element of accommodation on each side. The parties must have compromised before they appeared before me on 14 January 2005. A compromise is more in the nature of a contract. To amount to a contract, the arrangements between the parties must exhibit certain key characteristics. These key characteristics may be tabulated in this way:

(a) offer;

(b) acceptance;

(c) consideration;

(d) intention to create legal relations;

(e) mutuality;

(f) capacity; and

(g) legality.

The offer and acceptance would form the basis of the agreement between the parties and that agreement must be supported by consideration in order to establish the obligation. The parties too must certainly intend to create legal relations and the parties must also agree on the same thing. There must be mutuality between the parties and that they must be legally capable of reaching a binding agreement. Finally, the subject matter of the parties agreement must be legal. If all these seven elements are present, the agreement can be said to be a contract capable of being enforced legally.

The accrual of some benefit to one party or the suffering of some detriment by the other is the appropriate definition of 'consideration' (*Currie v. Misa* [1875] LR 10 Ex. 153 at p. 162). Cockburn CJ in *Callisher v. Bischoffsheim* [1870] LR 5 QB 449 at 452 rightly observed that:

> Every day a compromise is effected on the grounds that the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it …

In the context of the present case, the existence of a compromise can be seen in the consent judgment entered by the parties on 14 January 2005. It was as clear as crystal.

In other cases, the existence of a compromise is evidenced by an exchange of letters or by a written memorandum of agreement. Here, as I said, it was evidenced by way of a consent order entered by the parties on 14 January 2005. It is easily discernible, in the present case, to discern the existence of a valid compromise. In *Smallman v. Smallman* [1972] Fam. 25, the parties to a matrimonial dispute agreed to all the essential terms of a compromise and expressed it to be dependent "on the approval of the court". The Court of Appeal rejected the argument that the agreement was not binding unless and until it was approved by the court. Lord Denning MR at p. 31 of the report, expressed the law in this simple way:

> There is an agreement but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves it, it is binding on the parties. If the court does not approve it, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.

Both Mr. Prasad Abraham and Mr. K. Anantham are senior practising lawyers at the bar. They have appeared before me on many occasions. They are truthful lawyers, always mindful of their duties and obligations to the court. They have never misled this court. I see no reason to doubt that their clients have compromised and settled encls. 56 and 58 before they appeared before me on 14 January 2005. There was no evidence of fraud, no evidence of duress and no evidence of any threat, inducement or promise in order to vitiate the compromise. In *Elsas v. Williams* [1884] 52 LT 39, the court refused to allow the person who has consented to a compromise to withdraw his consent just because he subsequently discovered that he has a good ground of defence. The

order of this court dated 14 January 2005 has been extracted and it is reflected in encl. 68. In short, the compromise of the parties have been embodied in the order of this court which has been perfected and I must therefore refuse to disturb it (*Marsden v. Marsden* [1972] Fam 280 at 285, [1972] 1 All ER 1162 at 1166). The order of this court dated 14 January 2005 was clear and unequivocal and it reflected the compromise of the parties and it must stand accordingly. Moreover, the property in question has since been auctioned off on 28 April 2005.

In the past, the courts have consistently refused to set aside a compromise entered into by counsel (*Filmer v. Delber* [1811] 3 Taunt 486; *Wright v. Soresby* [1834] 2 Cr & M 671; *Lynch v. Cowell* [1865] 12 LT 548; *Strauss v. Francis* [1866] LR 1 QB 379; and *Rumsey v. King* [1876] 33 LT 728). Likewise here, the compromise, once entered, should not be disturbed at all.

Conclusion

For all the reasons as adumbrated above, I gave those orders as alluded to in the early part of this judgment.